2698

No. 12968

In the
United States Court of Appeals
For the Ninth Circuit

MONTE CLY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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To the Honorable the United States Court of Appeals for the Ninth Circuit:

JURISDICTIONAL STATEMENT

Jurisdiction is conferred in this case by Sections 1291, 1294, Title 28, U. S. Codes. Rule 37 Rules of Criminal Procedure for the District Courts of the United States.

The judgment of the United States District Court for the Southern District of California, Central Division, was rendered on April 13, 1951. (R. 35). Notice of Appeal was filed April 13, 1951. (R. 39).

STATUTES INVOLVED

Title 18, U. S. Code, Section 207 (1946 Edition), as follows:

"§207. *(Criminal Code, section 117.) Official accepting bribe.* Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States. (R. S. §§5501, 5502; Mar. 4, 1909, c. 321, §117, 35 Stat. 1109.)"

Title 18, U. S. Code, Section 202, effective September 1st, 1948 (New Edition):

"§202. Acceptance or solicitation by officer or other person.

Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in an official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States."

Public Law 129, Housing and Rent Act of 1947, Laws of 80th Congress—1st Session, effective July 1, 1947, Section 204 (1, 3 and 4):

"(c) The Housing Expediter is hereby authorized and directed to remove any or all maxi-

mum rents before this title [this appendix] ceases to be in effect, in any defense-rental area or portion thereof or with respect to any class of housing accommodations in any such area or portion thereof, if in his judgment the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exist, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met. The Housing Expediter is further authorized and directed to remove maximum rents for any or all luxury housing accommodations in any defense-rental area or portion thereof, if in his judgment such action would result in the creation of additional rental units by conversion. The Housing Expediter shall from time to time make surveys with a view to carrying out the purpose of this subsection to decontrol housing accommodations at the earliest practicable time.

"(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202(c).

"(e) (1) The Housing Expediter is authorized and directed to create and, if necessary continue in existence until the termination of this Act in each defense-rental area (whether or not under Federal rent control) or such portion thereof as he may designate, local advisory boards. The Housing Expediter shall, whenever in his judgment

there is need therefor, create a local advisory board in any part of an area designated under the provisions of the Emergency Price Control Act of 1942, as amended [50:Appx. 25], prior to March 1, 1947, as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of such Act, in which maximum rents were not being regulated under such Act on March 1, 1947. Each such board shall consist of not less than five members who are citizens of the area and who, insofar as practicable, as a group are representative of the affected interests in the area, to be appointed by the Housing Expediter, from recommendations made by the respective Governors: Provided, That in any case where the Governor has made no recommendations for original appointments to local boards or appointments to fill vacancies, within thirty days after request therefor (subsequent to the date of enactment of the Housing and Rent Act of 1948 [Mar. 30, 1948]) from the Housing Expediter, the Housing Expediter shall without such recommendations appoint the original members of such boards or such members as may be required to fill vacancies. Nothing in the foregoing provisions shall require the reappointment of present members of local advisory boards, but any change in the membership of any local advisory board necessitated by this provision shall be effectuated as promptly as may be practicable. Each such board shall have sufficient members to enable it promptly to consider individual adjustment cases coming before it on

which the board shall make recommendations to the officials administering this title [this appendix] within its area; and before recommending any such adjustment the board shall give notice to the parties and shall hold a hearing at the request of either party. Upon petition by a representative group of tenants or landlords, the board, if it finds that the petition is substantial in character, shall hold a public hearing in accordance with the requirements set forth in paragraph (4) of this subsection on any of the matters set forth in subparagraphs (A) and (B) of this paragraph. Such hearing shall be begun within thirty days after the filing of such petition, and shall be completed within thirty days after it is begun. Should the board for any reason fail to hold such hearing, the Housing Expediter, upon notice of that fact given by such group, shall (unless he finds that the petition is not substantial in character) hold a public hearing in like manner on such matters. Such hearing shall be begun within thirty days after the giving of such notice by such group, and shall be completed within thirty days after it is begun. If the Housing Expediter finds that such petition is not substantial in character, such group may file a complaint with the Emergency Court of Appeals within thirty days after the date such finding is made. Thereupon, if it finds that the Housing Expediter's finding is not in accordance with law, the Emergency Court of Appeals shall have jurisdiction to enter, within thirty days after the date of filing of such complaint, an order directing the Housing Expediter to hold such hearing. If a

hearing is held by either the board or the Housing Expediter, a recommendation by the board or decision by the Housing Expediter, as the case may be, on the merits of the matter shall be rendered within thirty days from the date of completion of such hearing, and the local board forthwith shall forward its recommendation to the Housing Expediter. Any local board may make such recommendations to the Housing Expediter as it deems advisable with respect to the following matters:

(A) Removal of any or all maximum rents in the area, or any portion thereof, over which the local board has jurisdiction, or with respect to any class of housing accommodations within such area or any portion thereof, if in the judgment of the local board the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exists, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met; and

(B) Adjustments, other than individual adjustments, in maximum rents in such area or any portion thereof or with respect to any class of housing accommodations within such area or any portion thereof, deemed by the local board to be necessary to remove harrships or to correct other inequities, or further to carry out the purposes and provisions of this title [this appendix]; and

(C) Operations generally of the local rent office with particular reference to hardship cases.

"(2) The Housing Expediter shall furnish the local boards suitable office space, stenographic assistance, and reporting services for public hearings (including attendance fees) and shall make available to such boards any records and other information in the possession of the Housing Expediter with respect to the establishment and maintenance of maximum rents and housing accommodations in the respective defense-rental areas which may be requested by such boards."

STATEMENT OF THE FACTS

The defendant, Monte Cly, was a real estate broker and general contractor living in the Bay Area making up Venice, Ocean Park, Santa Monica and the country back of it. He had been residing in that area around 20 years. (R. 373). As a real estate broker, he was familiar with the rental situation in and about this bay area since 1942.

In November 1947, he was solicited to become a Member of the Board, by the Supervisor of the district, regarding Rental Controls. (R. 375). He had his own offices and own stenographic force. No oath of office was administered. Cly was given a document called an "Oath of Office" which he signed on the 6th day of November, 1947, (R. Tr., 240-241) before F. C. Moeller, Los Angeles *Rent Supervisory Board Liaison Officer.* It does not appear that Mr. Moeller was a person authorized to take or sign oaths of office or induction. It was stipulated that there appears on

Government Exhibit 14 for identification a record of an Oath of Office signed by the defendant Monte Cly on the 6th day of November as the date that he took the oath of office and is signed by him. (R. Tr., 239). There was no provision for any pay by the Government. The Board met twice a month or whenever the Secretary called them. Mr. Hill became Chairman of the Board in January, 1948. Hundreds of people started to come to the Board with respect to their rental problems—about 60% were landlords and 40% tenants. (R. Tr., 250). The Board met twice a month—every other Monday. (R. Tr., 251) down at Santee Street in Los Angeles.

The Government produced Mr. Hill as its witness. He testified that the Chairman of the Board Mr. Koepke, gave Mr. Hill a number of forms, Mr. Hill asked Mr. Koepke if charges could be made for services rendered in filling in the forms and other papers. He commenced to do that (make charges) when he got the green light from the boss. (R. Tr., 255). "Many persons would come in with, say, one apartment and say they lived in half of a double house. No charge was made for that." Several hundred were made out without charges—at least 90%. (R. Tr., 256). The charges that were made were made for preliminary observation, for the work that was done in preparing the papers, going out and examining the properties, etc. (R. 69). It was not the duty of members of the Board to go out and examine the property—that was done voluntarily and on their own time. (R. 269). Recom-

mendations were made to the Housing Expediter who followed no recommendations except what his inspectors made. The Advisory Board simply recommended a certain increase and if the Housing Expediter sent his inspectors out and if they didn't like the looks of the property and they thought the Board was out of line they refused the increase. (R. 271). There was an arrangement between Mr. Hill and Mr. Cly to assist all tenants and landlords in filling out their papers. (R. 251). They began making a charge for their services shortly after the work load became very heavy. (R. 251). Before making the charges Mr. Hill discussed it with Mr. Cly first and then he discussed it with Mr. Koepke, the local rent area director for the Housing Expediter. That was in June, 1948. (R. 252). When he talked to Mr. Koepke, Mr. Cly was there and he asked Mr. Koepke, "Is it perfectly all right to charge for time and service?", and Mr. Koepke said, "Yes." (R. 253-254). The case against Mr. Hill was dismissed. (R. 244). Mr. Hill and Mr. Cly divided the monies received in half. (R. 201). As a member of the Board neither he nor Mr. Cly received any salary. Their services for the Government were gratuitous. The witness was asked this question by Government counsel, "Mr. Koepke, the Housing Expediter, or any one there, did he authorize you to make charges for your services to landlords or tenants?" A. "At one time we asked Mr. Koepke. Mr. Cly and myself asked—said that we had a lot of people wanting to file papers, etc.—and what should we do, and Mr. Koepke

said, 'Why charge them for it, of course, for your time and trouble in coming down here.' " Q. "Did he say how much to charge?" A. "No." (R. 216).

Newspapers carried publicity of the forming of the Board about the 12th of January, 1947, and people started coming to his house and to his office, morning, noon and night. (R. 376). They came in a constant stream; even during the night a lot of them would come to his house. He sent them to the proper offices and at times he and another member of the board prepared papers and documents.

Mr. Cly was one member of a five-man advisory board. The board meetings were not according to any set schedule, (R. 327) but Miss June Luscher would notify the Board Members when an accumulated amount of business would justify a meeting. This would result from the landlords or tenants applying for hearings by the Advisory Board of their applications or complaints or anything that they wished brought to the attention of the Board. There was a regular formal application they filled out and when a few of those would gather together, then we would notify the Board Members to come in and go into it. (R. 329). The Board Members would often bring in cases which apparently had been brought to their attention by individuals directly, and they would bring them into the meeting themselves. Mr. Hill and Mr. Cly did this very often. (R. 329). The board consisted of five; the quorum was three. (R. 330). Usually Mr. Hill and Mr. Cly were present. If there were only three present,

it took a unanimous vote to make an advisory recommendation. (R. 330).

Miss Luscher would handle the paper work and then any actual final orders that would be issued would be routed to the proper departments for their examination—the proper department to where recommendations would go. If the Board had recommended an increase in rent, it would go to the examining department where the actual orders were issued and then would be finally signed by the Rent Director, Mr. Koepke. (R. 331). She would request that an inspector be sent out to a certain property.

The office of the Inspector was at Santee Street. The Board Meetings would also be held at Santee Street, in Los Angeles. (R. 332).

Herbert A. Frank testified that he was a consultant in O.P.A. matters located in Santa Monica. He had been a rent inspector for the O.P.A. and when they closed their offices he went into business for himself as a rent consultant. He prepared petitions for landlords and things like that and charged a fee. (R. 116).

Mr. Hill was a witness for the Government. He testified that the making of charges was authorized by Mr. Koepke, the local rent area officer in charge for the Housing Expediter. His case was dismissed. Koepke denied he gave this authority. (R. 244).

Mr. Cly was convicted of Counts One, Four, Five, Seven, Eight, Nine, and Eleven, and sentenced to 18 months in the penitentiary and fined on Count Three—

$150.00, on Court Four—$750.00, on Count Five—$900.00, on Count Seven—$300.00, on Count Eight—$270.00, on Count Nine—$135.00, and on County Eleven—$50.00. Total fines: $2,555.00.

The indictment charged that on November 6, 1947, Monte Cly *signed* the Oath of Office as a member of Rent Supervisory Board No. 8 of the Los Angeles Defense Rental Area and continued to serve as a Board Member until his resignation on January 15, 1949. The indictment also alleges both defendants Cly and Hill were duly appointed pursuant to Public Law 129, 80th Congress, cited as Housing and Rent Act of 1947, effective July 1, 1947, Section 204(e) (1) thereof, which authorized and directed the Housing Expediter to create in each defense rental area, or such portion thereof, as he may designate thereof, a Local Supervisory Board, each Board to consist of not less than five members to be appointed by the Housing Expediter from recommendations made by the respective Governors. It also alleged that said Rental Advisory Board No. 8 in Los Angeles Defense Rental Area was duly created pursuant to said Housing and Rent Act of 1947. The functions of the local boards was to make such recommendations to the Housing Expediter as they deemed advisable with respect to decontrol of apartments, housing units, and rental property within the Defense Rental Area, and to take necessary action in regard to the decontrol of such units or the increase or decrease in rent as the Board considered appropriate." These facts were alleged in Count I.

Count Three, on which appellant was convicted, alleged, that on December 6, 1948, defendant did unlawfully and in violation of Title 18 U. S. Code Section 202 accept and receive a check in the amount of $50.00 from Mr. and Mrs. Claude W. Chapman with the intent that their action would be influenced thereby in favorably recommending to the Housing Expediter that rent increases be authorized at that certain property known as the Montezuma Apartments at 407 Ocean Front Walk, Venice, California, *this being a matter then pending before them in their official capacities."* Other facts essential to a valid indictment and set out in the last paragraph of Count One were not realleged on the counts on which conviction was based, but were specifically omitted.

Each of the counts charged transactions with different names and different addresses in identical terms. Each charged that the matter was *"then pending before them in their official capacities."*

SPECIFICATION OF ERRORS

The appellant specifies the following errors in the record of the trial of the proceedings:

1. (a) The indictment in the counts on which conviction was had fails to state an offense against the laws of the United States. It fails to allege that they "took" the oath of office, and before one authorized to give it. It also fails to state in such counts that they duly and regularly became officers of the United States as members of Rent Advisory Board No. 8 of the Los Angeles Defense Rental Area.

   (b) The Public Law No. 129, 80th Congress, cited as the Housing and Rent Act of 1947, does not forbid the taking of money for services rendered in connection with the Housing Act, and such acceptance of money was not made unlawful by the act.

2. The evidence is insufficient to support the verdicts. The verdicts are contrary to the law and the evidence.

   (a) The evidence fails to show that the defendant Monte Cly duly and regularly actually became a member of the Rent Advisory Board No. 8. The evidence is that he *signed* an Oath of Office, but the Oath of Office on its face shows that it was not signed before an officer duly authorized to take oaths of office or that he was ever lawfully given the oath of office and inducted as a lawful member of the Advisory Board.

(b) The evidence is insufficient to show that the defendant Cly was duly appointed pursuant to the provisions of Public Law 129, 80th Congress, and in the manner prescribed by law for such appointment. The evidence shows that he was solicited to become a member of the Board by a Supervisor.

(c) The evidence is insufficient to show that any matters in which monies were taken "*were matters then pending before Monte Cly in his official capacity as a member of the Rent Supervisory Board.*" Count Three alleges taking $50.00 from Mr. and Mrs. Claude W. Chapman, and that the matter was pending before the Board and its members in their official capacity. The evidence fails to show that the matter was pending before the Board in its official capacity. Count Four charged taking $250.00 from Mr. and Mrs. Harry Neiditch, which was not shown by the evidence to be pending before the Board in its official capacity. Count Five charged the taking of $300.00 from Don Greco, which was not shown by the evidence to be pending before him in his official capacity. Count Seven charged the taking of $100.00 from Norman Westcoatt, Executor, which was not shown by the evidence to be a matter then pending before the Board in their official capacity. Count Eight charged the taking of $135.00 from Mrs. Mabel Preston, which was a matter not then shown by the evidence to be pending before the Board in its official capacity. Count Nine alleged the

taking of $50.00 from Mrs. Frances Barker, which was a matter not then shown by the evidence to be pending before the Board in its official capacity. Count Eleven charged the taking of $50.00 from Mr. and Mrs. Frank Cohen, which was a matter not then shown by the evidence to be pending before the Board in its official capacity.

(d) The evidence of the government shows affirmatively any lack of criminal intent. The government is bound by the testimony of its witness Mr. Hill.

(e) The evidence is lacking in proof of any criminal intent.

3. The Court erred in admitting testimony of alleged similar transactions regarding Earl J. Templeton (R. Tr. 90, 110) over objections.

4. The Court erred in the admission and exclusion of evidence.

5. The Court erred in its comments to the jury on the facts of the case. The comment was one-sided and unfair in its scope and virtually told the jury to convict. It added to the facts, and assumed facts not proved and destroyed the constitutional privilege of the accused to testify in his own behalf before the jury without destruction by judges "comment."

The Court erred in its instructions to the jury. The instructions were confusing on the essential law of the case, as charged in the indictment.

ARGUMENT

I.

THERE IS NO PROOF THAT MONTE CLY WAS DULY AND REGULARLY A MEMBER OF THE RENT CONTROL BOARD No. 8. THE EVIDENCE IS TO THE CONTRARY.

1. The indictment says he "signed" the oath of office. It does not say he "took" it. The testimony shows it was signed before a liaison officer of the Rent Administration. He was not authorized to give oaths of office. Title 5 Sections U. S. C. specify who may give oaths of office. The liaison officer of the Housing Administration is not one of them.

2. The evidence does not show that Cly was "duly" selected. He was picked by the "Supervisor" of the district on housing.

3. The Act gives no power to individuals, but only to the Board to make recommendations on matters officially before the Board. No offense is charged in charging individual action. The indictment does not charge being influenced to act on the Board.

II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT. THE VERDICT IS CONTRARY TO THE LAW AND THE EVIDENCE.

At the outset it must be pointed out that Housing and Rent Act of 1947 contains no provision either for any compensation or salaries from the government for members of the Advisory Board, nor for reimbursement by the government of expenses. Nor does the Act forbid any member of the Board from receiving private compensation for incidental services, ~~clinical~~ work, cost of gasoline in making inspections, etc. The questions then in this case narrow down to the following:

1. Was there a matter *then* pending before the Board in *its official capacity,* as alleged in each of the counts of the indictment? **The proof fails to show it.**

2. Was any money given and received by the appellant for the purpose of influencing his action in any such matter then *pending before them in their official capacity?* **The proof fails to show it.**

3. Was any money received with intent that his action would be influenced thereby in favorably recommending certain matters to the Housing Expediter?

At the outset, let us examine some applicable law in the questions involved. Neither count three, nor any of the other counts of which the appellant was convicted charge that the appellant was *acting in his offi-*

cial capacity as a member of said Rent Advisory Board Number 8. This allegation was presented in the first count of the indictment, but omitted and excepted to in all of the other counts of the indictment. This element of the indictment was highly essential to create a public offense, because various government officials are permitted to take compensation and act in private capacities although holding government positions.

It is well known to this court that at the last two sessions of the judicial conference, the questions of the United States attorney accepting private employment in their private capacities while holding government positions has been a subject of considerable discussion. For many years the clerks of the court were permitted to take additional fees, or there were fees reverted to them for work done in supervising printing, securing attorneys as members of the bar, and other matters. Men who hold honorable positions cannot be denied compensation or reimbursement of time and expense on their private time. They are not acting in their official capacity when their time, their gasoline, telephone, stationery and other features of service are rendered.

In the instant case, the men received no compensation on the Board. Mr. Cly had a private business and private offices for which he had to pay rent, telephone, stationery, stenographic service.

The announcement of the formation of the Board caused hundreds of persons to come to his office, as

well as his home, keep his telephone and his office busy both day and night.

As a result of the request for services, filling out forms, doing typewriting work and many other clerical services, Mr. Hill, the chairman of the Board, asked Mr. Koepke if it was all right to charge for those services. Mr. Koepke gave his consent, according to Mr. Hill. The government put Mr. Hill on and they are bound by his testimony. (R. 215, R. 216). Mr. Koepke said, "Why, charge them for it, of course, for your time and trouble in coming down here. (R. 216). No charges were made to influence anybody, nor were they asked, or received for that purpose.

IN NONE OF THE COUNTS UNDER WHICH CLY WAS CONVICTED WAS THERE ANY EVIDENCE THAT ANY OF THE MATTERS WERE THEN PENDING BEFORE THE BOARD OR ITS MEMBERS IN ITS OR THEIR OFFICIAL CAPACITY.

We challenge the government to show any evidence to establish that any of these matters were *then* pending before the Board members in their official capacity. Without it the evidence is entirely insufficient.

Furthermore, the charge as framed does not allege that the defendants asked or received the money for influencing their own actions as a member of the Board, or *in their capacities on the Board* in influencing their actions to make a favorable recommendation to the

Housing Expediter. But action before the Housing Expediter must be *an action by the Board,* not their individual action.

In none of the counts or transactions is there any substantial evidence that the appellant Cly's actions were influenced in anywise by the receipt of any money.

COUNT III.

INSUFFICIENCY OF THE EVIDENCE AS TO EACH COUNT

Count three of the indictment relates to a transaction on December 6, 1948, in which $50 was received by Mr. Hill from Mr. and Mrs. Claude Chapman, owners of a property known as the Montezuma Apartments at 407 Ocean Front Walk, Venice, California. Mr. Hill, president of the Board, whose case was dismissed, came to his apartment twice. (R. 22). On December 6th, *prior to that date, he didn't have any matter pending before Advisory Board No. 8.* (R. 23). He had a telephone call. Went to Mr. Cly's office and Mr. Cly and Mr. Hill were there.

Claude C. Chapman had dealings with Mr. Hill. (R. 24). He brought all of his OPA papers to the office. He was asking for a raise of rent. (R. 24). He had not made any application to the Board. He came to the office to provide those papers to Mr. Hill. Hill said the office would make out the papers. He made out a check to give to Mr. Hill. (R. 27). $50.

Mr. Hill told him that there had to be papers filled and there had to be some work on it. *Mr. Hill said there would be quite a bit of work on the papers and it would cost $10 and an apartment for each of the applications to make them out.* (R. 28).

Mr. Hill and Mr. Cly were members of the Board at that time. He did not give the money to Mr. Hill or Mr. Cly *to bribe them. Payment was for the work. They said there would be quite a bit of work connected with it, or something to that effect.* (R. 31). *He did it on account of they said they could get quicker results and they would have to draw the papers up anyway and the apartment house association more than likely would charge me something for drawing the papers up and I eventually gave them the $50.* (R. 31). After he filled out the papers an inspector was down to his place. (R. 32). He did not appear before the Board. *At no time did it occur to him that he was paying Mr. Hill for his influence on the Board.* (R. 33). *Mr. Cly was not there. It was not his intention to give the money for that purpose.* (R. 34). *Mr. Hill was at his apartment four or five times.* (R. 34). The testimony is, thus, insufficient!

(a) To show that any matter was pending before the Board.

(b) That money was asked or received by Cly to influence any actions or that Mr. Cly's actions were in anywise influenced to make any recommendations to the Housing Expediter in an official matter then

pending before the Board. It will be noted that nearly the whole transaction was conducted by Mr. Hill whose case was dismissed.

The indictment charged the appellant accepted and received a check in the amount of $50 from Mr. and Mrs. Claude Chapman. The sole testimony about giving you the check was that his wife gave it to Mr. Hill. (R. 27).

> "Q. You gave the check to whom?
> A. I gave the check to Mr. Hill, I think.
> Q. You think you gave the check to Mr. Hill?
> A. I think my wife gave it to Mr. Hill, but I am not sure of that." (R. 27).

The proof was entirely insufficient.

(a) That Mr. Cly received any check.

(b) That he was acting in any special capacity.

(c) That any matter was a proceeding which was then pending before him in any official capacity.

(d) That it was given with the intent to influence the decision or action, or accepted with that intent.

Judgment of acquittal should have been granted at the end of the government case on the motion of defense counsel duly made. (R. 366, R. 367).

COUNT IV.

As to count four, the evidence is insufficient for each of the reasons pointed out as to count three with the additional facts shown with reference to count four as being insufficient. Count four charged the acceptance and receiving by the defendant, Cly, of a check in the amount of $250 from Mr. and Mrs. Harry Neiditch, with reference to recommending favorably to the Housing Expediter that rent increases be authorized at a property located at 1341 Fourteenth Street, Santa Monica, California. Mr. Neiditch said that he did not have any occasion to contact Mr. Cly, that he contacted Mr. Hill. (R. 69). Never talked to Mr. Cly. (R. 70). Mrs. Neiditch never had any dealings with Mr. Cly. (R. 71). One time Mr. Cly walked through the office, didn't participate in any conversation. All her discussions were with Mr. Hill. (R. 73). Mr. Hill at no time testified that his actions were influenced or that he influenced Mr. Cly's actions, or that Mr. Cly's actions were ever influenced in connection with any matter coming before him with reference to this property.

The evidence therefore does not show Mr. Cly ever received a check.

(a) That he ever received a check.

(b) That any matter was then pending before him in his official capacity.

(c) Or that he was acting in his official capacity.

(d) Or that his actions were in any way influenced in making any favorable recommendations with reference to the Neiditch matter. Evidence is wholly insufficient to support the judgment.

COUNT V.

As to count five, each of the grounds urged as to counts three and four are reurged here with the additional facts as follows:

Count five alleged that the defendants accepted and received $300 in cash from Don Greco with the intent that his actions would thereby be influenced in favorably recommending to the Housing Expediter that an increase be authorized at that property located at 126 Palisades, Santa Monica, California, this being a matter then pending before him in his official capacity. Mr. Greco testified that Mr. Cly came over to his house with Mr. Hill. Never had any contact by telephone or otherwise prior to that visit with Mr. Cly. Mr. Hill brought him over (R. 169) and he asked Mr. Hill what he thought about the property in the presence of Mr. Cly. (R. 17). Mr. Cly said he thought it was well worth the raise that he was trying to get, that he wasn't getting enough rent for the bungalows there. (R. 170). Mr. Cly said, "I think you should be able to get a raise on it because the property is a nice piece of property." The conversation went along the line that the property was well worth the raise and he thought that Mr. Greco should be able to get a hun-

dred or a hundred and twenty-five dollars and made the remark he didn't want that much, he wanted just a reasonable raise and he said they would help him, and at the conclusion he said it would cost Mr. Greco some expense money. Mr. Greco asked him how much, and he said it would amount to $300, both for paper and expense of that kind. (R. 171). He said he paid Mr. Cly $300 in cash. He didn't know Mr. Cly was a member of the Board. (R. 172). He presumed Mr. Hill was, he didn't know he was. He thought he might have something to do with it. (R. 172). Never went to their offices, didn't have any further contact with him; he never saw him after that time. He got an increase per bungalow, but he never used that increase on the tenants. He got permission to raise the rent $5. He had 6 bungalows. (R. 174). He didn't have any paper. Quite a few months later, probably 3 or 4 months later, that he got an increase. There was an inspection made of his premises. Doesn't remember whether it was by a lady or gentleman. That was after this meeting with Mr. Cly and Mr. Hill. (R. 175). He wasn't there at the time of the inspection. Mr. Hill and Mr. Cly looked over the premises very carefully when they first came there. (R. 174). He had known Mr. Hill for some time prior to that time, Mr. Greco had a bar and he didn't know if he had met Mr. Hill at the bar or not. He was in Mr. Hill's office once or twice. (R. 176). Had a little office and printing shop in Santa Monica. (R. 176). Didn't know where Mr. Cly's office was. Some papers were prepared and he brought

the papers down signed. (R. 177). Were brought to Mr. Hill. He thinks Mr. Hill prepared the papers. (R. 177). Nothing was ever said at any time about influencing the actions of the Board with relation to the rent at the time of the payment of the money. (R. 178). At no time did he have in mind that he was buying the favor of the local rent board in connection with his application. (R. 178). He had no idea that the matter would even come up before the Board.

He didn't know that Mr. Cly was a member of the Board. He didn't know whether Mr. Cly had the influence of the Board and he wasn't buying any influence and he didn't offer him a bribe for any influence. (Cal. 179).

He did not bribe them for their influence and that was farthest from his mind. (R. 180). Mr. Hill testified that he went over to Greco's place and went through all the apartments. He thinks that Mr. Cly was with him but he might be mistaken on that. (R. 189). He went through all of Greco's apartments and felt that the man was justified in asking for his increase because he had a beautiful place there. Hill filed papers for him and had the inspectors come out and look over his place. They permitted him an increase in the rent which was not in line with what I felt he deserved, but I felt it was better than nothing. (R. 189). The matter came up before the Board and two other members of the Board went out and looked over the place . . . Mr. O'Brien and Mr. Smith. (R. 190). They asked that the property be inspected. $5.00 a

month increase was recommended for six apartments. (R. 190). Mr. Hill wrote Koepke protesting that there was not enough.

The matter did not come up before the Board until July. Could have been August 13th. (R. 192). When the matter came up before the Board they all discussed it, all gave their opinions, because we were all Santa Monica people. He didn't know whether it went to Mr. Koepke, but supposed it went into his hands, but the inspectors went out and they in turn either denied the recommendation or concurred in it. (R. 192). When the inspectors went out Mr. Hill accompanied them that day. (R. 192). Recommendation was made for a $5 increase. Mr. Hill thought it was worth considerably more. $300 was paid. Mr. Cly got some of the money. (R. 193). Mr. Hill said he knew Mr. Greco for many years (R. 198) and Mr. Greco asked if there was any way he could get the property increase. Thinks Mr. Cly was with him, but he might be wrong. He checked comparable rents and found that other properties not nearly as nice were renting for considerably more, so he told Don (Greco) that we would try to get him an increase. Mr. Hill said that Greco was willing to pay for our time and trouble, and that the money represented the amount that we spent, "and I am going to continue to use the singular." I came into Los Angeles and I looked over the records and looked over what particular properties were renting for and he was way below the margin, in my opinion, especially comparing it with the nice place he has, and he said he was

perfectly willing to pay us for our time and trouble in doing that. When we filed the papers for him, or I filed the papers for him (R. 199). He said he filled out a paper that was a long drawn out thing, answered all the questions, etc. (R. 199). Mr. Hill prepared the papers. Mr. Cly has the real estate office and they used Mr. Cly's office in connection with rent advisory board matters. (R. 200). At the time the money was paid he knew the matter would come up before Ford in the future. (R. 199).

Mr. Hill states that nothing was pending before the Board (R. 199). He made out all of the papers, divided the money, half to Mr. Cly (R. 201) Mr. Hill did all of the typing and Mr. Cly when they first found out it was all right to ask for their expense money, etc., for doing this work (R. 202) knew of client. Mr. Cly denied he was present when Greco paid Hill the $300. (R. 499, R. 500).

COUNT VII.

Count seven charged receiving $100 in cash from Norman Westcoatt, executor of the estate of Lily Dillon, deceased, regarding a property located at 1002 Nowida Place, Venice, California. Mr. Westcoatt testified that on November 20, 1948, he had some discussion with Mr. Hill (R. 130) at Mr. Cly's office, Mr. Cly being present. Mr. Cly told Mr. Hill to go out and look at the property, and from that time on Mr. Hill wrote the letters and carried on the business with him. (R. 131). Mr. Hill first came out and looked at the property and there were so many different forms that had to be filled out and different things, and it was so confusing and everything else, so I looked at the Venice papers and read about the Rent Board, and that is how I got in touch with the office down there. He asked where could he get those papers filled out and Mr. Cly replied that Mr. Hill makes out these papers (R. 132). He asked how much it would cost to fill out these papers as he was leaving to go out of town, and I asked what it would cost. Mr. Hill knew he had better go over and look at the property and that is when Mr. Hill came over and made out the papers, and I asked Mr. Hill what it was going to run me. He at no time ever discussed the matter with Mr. Cly. (R. 132, 133). He paid $100 in cash presumably to Mr. Cly. *$100 was to make the papers out for the eleven units.* When Mr. Hill came back, Mr. Westcoatt said there is so much red tape with these letters and papers and the hardship and the taxes I will just forget about it. (R.

138). He did his work in good faith and Mr. Westcoatt paid him for it. (R. 138). All that was said in that relation to the matter by Mr. Cly was "Well, we will do the whole job for $100, so I paid him." (R. 130). The dealings were almost entirely with Mr. Hill (R. 140) *who was told definitely and specifically that the $100 was for services in connection with Mr. Hill preparing the papers.* (R. 141) There was no discussion about any rent increase he would get. *He did not appear before the Board. At no time when he gave the $100 did he have in mind that he was paying for the influence of Mr. Cly as a member of the Rent Advisory Board No. 8 to give favorable action* (R. 142) nor to influence Mr. Cly's actions as a member of the Rent Control Board (R. 143). He did not know at the time Mr. Hill or Mr. Cly were members of the Advisory Board (R. 144).

This evidence was entirely insufficient to show that any money was asked or received to influence his actions, or that any matter was then pending before Cly in his official capacity.

COUNT VIII.

Count eight of the indictment charged Cly with asking and receiving $90 in cash from Mrs. Hazel Preston with intent that his action would be influenced thereby in favorably recommending to the Housing Expediter, a rent increase at 1423 - 19th St., and 2840 Santa Monica Blvd., 543, 549 Lincoln Blvd., Santa Monica, Calif. Francis Barker testified regarding count eight (R. 153). Mr. Cly introduced her to Mr. Hill. He paid $45 to Mr. Cly. (R. 157). $15 per unit for 3 units. He asked Mr. Cly what the $15 was for *and it was for the paper work* (R. 161). *He didn't know that Mr. Cly was a member of the Advisory Board* (R. 161). It was her idea *of the charge for the paper work.* (R. 162). *She had papers made out, never attended any Board meetings. Nothing said with reference to influencing Mr. Cly upon the outcome of the application* (R. 165). *It was purely for paper work as we understood it* (R. 165). The evidence is insufficient to show that the money was paid to influence anybody for making a favorable recommendation to the Housing Expediter, or that there was any matter then pending before Mr. Cly in his official capacity or otherwise, or that any matter was then pending before the board.

COUNT IX.

In connection with Count nine we point out that the evidence is sufficient upon each of the grounds mentioned in connection with Count 3, and in addition thereto, we point out the following:

That Count 9 charges the receipt of $45.00 from Mrs. Francis Barker, who also has a sister by the name of Mrs. Preston, the Mrs. Hazel Preston referred to in Count 8. She said she and her sister were handling the transaction at the time, and her testimony, as set out in Count 8, also relates to Count 9.

Mrs. Murray Spencer, Geraldine Spencer, (R. 77) testified as to count 8 that she had a conversation with Mr. Cly over the telephone and asked him if she could see him and told him that she had the deed to the property—that it finally had been vacated and she was keeping it vacated as a sort of one man's stand against the rental ceiling, that she had it vacated for six months and then she decided to redecorate and rent it. Mr. Hill and another man came up and looked at the place. (R. 80). It was in June of 1948 that she went down to Mr. Cly's office, she saw he was a general contractor and he was on the Board, and felt she had a fine story and wanted to get a better rental before she put it on the market (R. 81). She knew he was going to try to help her get a better deal but with all the money she had spent on it as far as redecoration could be used as added rental, because she had spent a lot of money (R. 82). She doesn't remember what kind of arrange-

ments she made. She paid him $200.00, and thinks her house was decontrolled before *she gave him the money, she can't remember when she gave it to him.* (R. 83). She couldn't remember whether she paid the money before or after the decontrol (R. 86), Mr. Cly never told her he would use his influence as a member of the Board to get her house decontrolled, nothing like that intimated. (R. 86). If the $200.00 was just a gift in services rendered, she really didn't know. (R. 87). She never believed she filed an application with the Office of the Housing Expediter on the 19th of June, 1948 asking that her property be decontrolled. She just signed it and didn't file it. She signed it in Mr. Cly's office. (R. 87). It was prepared by someone else and handed to her by Mr. Cly. *She never appeared before the rent control board.* The copy came back marked filed. She made a point of paying cash for anything that was to be done and just asked for a receipt. (R. 89).

The evidence is insufficient to show that any money was *asked for the purpose* of or received for the purpose of influencing any official action, or that there was any matter pending before the Board.

COUNT XI.

Count Eleven charges accepting and receiving the sum of $50.00 from Mr. and Mrs. Frank Cohen, with the intent that their acts would be influenced thereby in favorably recommending to the Housing Expediter that rent increases would be authorized on certain properties located at 209 and 209½ Club House Drive, Venice.

Rose Reubens, who was formerly Mrs. Frank Cohen, (R. 122) testified that she had some rental property in Venice located at 209 and 209½ Club House Avenue, Venice. She didn't know whether her husband ever discussed their property with Mr. Cly. She was never with him when he discussed this with Mr. Cly. He subsequently died, on October 19, 1950. (R. 124).

The evidence fails to show that Mr. Cly accepted and received the sum of $50.00 from Mr. and Mrs. Frank Cohen with the intent that his action should be influenced favourably recommending to the Housing Expediter that rent increases be authorized at 209 and 209½ Club House Drive, Venice. There is no evidence that the matter was then pending before the board in its official capacity.

THE COURT ERRED IN THE ADMISSION OF THE EVIDENCE IN THE TRIAL OF THE CASE

Over objection, the testimony of Earl J. Templeton was admitted to show intent (R. 91). His testimony was that on another occasion, the exact date of which he couldn't remember, he called Mr. Cly in regard to his property. It was in 1948. (R. 91). It was Sunday evening. He was to meet at 7:00 o'clock at Mr. Hill's home. When he arrived nobody was at the house. After a while they got there, and then Mr. Hill and Mr Cly and he sat down on the davenport, all together, discussed an OPA folder, and either Mr. Hill or Mr. Cly made the statement when he started "Well, we have been all around a little." He said "You know how business is done . . . the boys down at the OPA office have to live too" and a hundred dollars was suggested. (R. 92). That was all that was said. He never did pay it. (R. 94). He had two papers pending before the OPA Board of Decontrol. (R 94). The office at Santa Monica regarding the OPA had been closed when he saw Mr. Hill and Mr. Cly. He went to Mr. Cly to find out why the increase in occupancy had not been allowed, and he had raised his rent from $35 to $50, telling his tenants he was going to file and did file for an increase in rent. (R. 98). It was sometime after Thanksgiving in 1949. He never had any matter pending before Advisory Board No. 8. (R. 99). He never appeared before the Board. (R. 100). He could not say definitely which of the

two men said he reported. This was the only time he had ever seen these two men. (R. 101).

A motion was made to strike the evidence at the close of the government case. (R. 363, 364). The Court, in denying the motion to strike, said, "If the jury believes his testimony, it shows, at least, that Mr. Cly was susceptible of accepting a bribe." Testimony as to similar transactions is not admissible for the purpose of showing "at least that Mr. Cly was susceptible of accepting a bribe."

Where the charge is bribery paid with specific intent to influence a specific action, testimony as to a "similar" offense is not admissible, for it would permit conviction of one charge upon proof of another not alleged, and violates due process of law guaranteed by the Fifth Amendment.

Cole vs. Arkansas, 333 U. S. 196;
De Jonge vs. Oregon, 299 U. S. 587.

In the case of *People vs. Glass,* 158 Cal. 650, the Supreme Court of California said:

> "Headnote 2: The law would not have permitted evidence of distinct acts even to show a former bribery of Oakland Supervisors. Not only is the prosecution forbidden to show a former distinct crime, but it is also forbidden to prove former distinct acts short of crime, the tendency of which is only to degrade and prejudice the defendant in the minds of the jury." In that case the Court said in discussing the case at length, "It

would, no doubt, have made most potently against this defendant in the minds of the jurors if, for example, it could have been shown that in this separate and distinct Oakland transaction he had bribed the councilman there. But no one has been bold enough to assert that such evidence would be admissible, and the decisions of every court, including our own, are against its admissibility. Not only is the prosecution thus forbidden to prove another crime, but the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury."

This case clearly and fully discusses the bad effect of permitting evidence of the character allowed in the instant case to be introduced.

In the case of *People vs. Washburn,* 104 Cal. App. 662, the Court specifically held that evidence of another bribery is not permissible to admit a separate offense.

Only in certain types of cases where the issue of plans, schemes and designs are involved, may there be proof of similar transactions, and in such case, the alleged similar transactions must establish the corpus delicti of the similar transaction or it is not admissible in any event. In each of these instances, in instant case, each and all of these requirements were missing. The testimony, therefore, was entirely prejudicial, since it was the only testimony in the entire record which indicated, as the court expressed it, in the presence of

the jury "That Mr. Cly was susceptible of accepting a bribe." (R. 64).

The Court's comment in this case is what the Supreme Court of California specifically contended as highly prejudicial in its opinion in *People vs. Glass,* 158 Cal. 658.

COURT'S ERRONEOUS RULING IN THE PRESENCE OF THE JURY

The Court said in the presence of the jury after a witness had testified that the money she paid was "purely for paper work as we understood it." (R. 165).

> "The Court: We might as well settle that question right now, and this is a comment not binding upon the jury, but we know that when anybody is in the government business, we do not have to pay them a fee for them to do their work."
>
> Mr. Shippey: Now, that is assuming . . .
>
> The Court: It is certainly unusual, but my comments in that respect are not binding on the jury. You are to settle that question. I don't want to hear any more argument.
>
> Mr. Shippey: I'm not going to argue, but I am going to ask that the record indicate that we take an exception to the remarks of the Court.
>
> The Court: You don't have to take an exception, the exception is automatic.
>
> Mr. Shippey: Very well. Just so long as the record reflects our feeling in the matter, that is sufficient." (R. 166).

This was a prejudicial statement of fact, as of law, in the presence of the jury. Many persons in the government service receive a fee for them to do their work. Certain statutes have been set up specifically permitting the taking of fees, for instance, for the taking of an oath of office, notarial work, and many other features of government service. For a long time the Clerks of the District Courts worked on a fee basis. The United States Marshal's office still works on a fee basis and any service of papers by the Marshal has to be paid for privately.

ERRORS IN INSTRUCTIONS GIVEN

THE COURT ALSO ERRED in instructing the jury as to the entire statute under which the appellant was prosecuted. (R. 578), as follows:

> "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either house, or of both houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceedings which may

> at any time be pending or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be guilty of an offense."

The instruction regarding the statute was misleading, since the indictment only charged the appellant with accepting or receiving money with the intent of having his decision influenced on a question at that time *pending* before him in his official capacity; to charge him under the entire statute was to charge him and to confuse the jury on the charge not actually contained in the indictment. While the charge of the entire statute was not objected by counsel, nevertheless, the matter went to the very heart of the case, and where a jury has not been properly instructed as to the law, or has been erroneously instructed regarding the law that goes to the very heart of the case or in a misleading fashion, prejudicial error will be deemed committed and reexamined on the plain face of the record. (*Corson v. U. S.*, 147 Fed. (2d) 437).

In *Screws vs. The United States,* 325 U. S. 106-107, the Court says:

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take notes of it on our own motion."

In *Corson vs. The United States, the Court of Appeals of the Ninth Circuit,* 147 F. (2d) 437, says that

the jury must be properly instructed as to the law of the case.

Here we have a charge not made by the indictment and attempted to be presented to the jury. The case was tried on the charge not made by the indictment, as there was no proof of the charges actually made by the indictment; therefore, the error was highly prejudicial.

The court also erroneously instructed the jury on the statute that was not yet passed. The court read the jury the later statute instead.

ERROR IN COMMENTS TO THE JURY

In *Quercia v. United States,* 289 U. S. 466, at 469, 470, the Supreme Court pointed out that the privilege of the Judge to comment on the facts has its inherent limitations. "His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness—he may analyze and desiccate the evidence but he may not either distort it or add to it. His privilege of comment, in order to give appropriate assistance to the jury, is too important to be left with the safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his slightest word or intimation is received with deference and may be controlling.' This Court has accordingly emphasized the duty of a trial

judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided' that 'deductions and theories not warranted by the evidence should be studiously avoided.' He may not judge 'upon a supposed or conjectural set of facts of which no evidence has been offered.' 'It is important that hostile comment of the Judge should not render vain the privilege of accused to testify in his own behalf.' "

TRIAL JUDGE RENDERED DEFENDANTS' DEFENSE VOID

Examined in this light, the comments of the trial judge in this case violated all of these fundamentals. The trial judge told the jury, "The question is, did they have a right to accept a bribe because it required work." (R. 570). This assumed that a bribe was accepted, which was the very issue that the jury had to decide. The Court then went on to argue, "Would I be justified because I don't think I am being paid enough to accept money from litigants and then say it was simply for my services?" "They say they were only supposed to be working while they were sitting on the Board. Would I be justified in accepting money as an attorney and then pass upon the case before me and say that I was accepting the money as services and not as a bribe and be justified in doing it?" (R. 574). We think this was not fair comment. The Court further practically told the jury to convict the defendants on Count 5 and then if they convicted the defendants on Count 5

to convict on the other counts. The Court says, (R. 575) " . . . but it seems to me the outstanding count in this indictment is the *Greco* case, Count No. 5. What do we find? $300 paid to these men and their advocating the matter before the Board. As their advocate they were accepting money to advocate his cause and you can't spell anything else out of it." We find nothing that commented favorably in behalf of the defendant or lined up his position. The trial judge also made some misstatement of facts in his comments which were unsupported by evidence. The Court said, "In the first place there is no dispute that we have one man here who has *taken an oath of office.*" This is contradicted by the record and by the indictment itself which says that an oath was signed, and it does not appear from the evidence that it was signed before any official authorized to give it. The trial court also said in its comments, "And then we have evidence, undisputed evidence that charges were made and the only dispute between the parties is whether this money *was paid* with the intent to influence his decision or action on any question pending before the advisory board. Was that the purpose? There is no question here as to that." This was not the issue before the jury at all as to whether this man was paid with the intent to influence the Court's decision, but was asked and received for the purpose of influencing his decision on a matter pending before him. The statement of the Court clearly misstated the issues before the jury to the appellant's prejudice. (R. 571). Nor was the question as stated again by the Court on page 574. The

question is, did they have a right to accept the bribe because it required work? That was not the question before the jury at all, and it was a misstatement of the issues before the jury to the extreme prejudice of the appellant.

THE TRIAL COURT PREJUDICIALLY ERRED IN ITS COMMENTS ON THE FACTS OF THE CASE TO THE JURY.

In the Federal Court the Judge charged the jury regarding the facts of the case and commented on the evidence. Such comments are regarded as a part of the trial judge's charge. The rule regarding such a charge is that it must be fair and impartial to both sides, and analyze the evidence from the standpoint of both sides. The charge which is one-sided, or which is not fair and impartial violates this fundamental rule.

It cannot be said that the following comments of the Judge were a fair and impartial charge to the jury. The court said to the jury "In the first place there is no dispute that we have one man here who has *taken* (misstatment of fact) an oath of office, to faithfully perform his duties as a member of the Rent Advisory Board. It was also contained *in that same statement* that he was to perform those services without any charge." There is nothing in the statement of his oath that he was to perform any services without any charge. There is no statement in the statute forbidding a charge

for services other than to the government of the United States.

The court further said "Notwithstanding, this individual *agreed* to *make no charges,* he nevertheless did." (R. 71). We find nowhere in the records of this case nor in the statutes that Cly agreed to make no charges to private persons. The statute is certainly silent, on whether there could be reimbursement for expenses, stenographic labor and other appurtenances attached to the same for typing and copying any documents. Even in court it is expected that the party who receives the benefits will pay for it. There is nothing in the law which justifies the Trial Court's comments to the jury in this respect.

It appears that the case against Hill was dismissed and against Cly was prosecuted. The Court took occasion to comment and debate with defense counsel on this matter. Whether one defendant could be convicted of accepting a check when the other defendant accepted it, and had his case dismissed was a question for the jury to decide and not for the court to argue that it did not make any difference.

The Court further says that considerable point was made that Mr. Koepke authorized the defendant and Mr. Hill, formerly the defendant, to make this charge. The Court said: "Neither Mr. Koepke, nor anybody else, could authorize this defendant to violate the law." That assumes that the law forbids making a charge. We find nothing in the law that forbade making a charge, we only question whether the charge was for

the purpose of influencing official action. We think it was error for the Court to assume that it was a violation of the law, the very fact in dispute.

The Court further says that both Mr. Hill and Mr. Cly testified that Mr. Koepke told him that—and it is a question of fact for you to determine—did he tell them that? Does their conduct indicate that he told him that? They testified he did, and that Mr. Koepke denied it and he fired them for it. And did Mr. Cly get mad about it? No. He writes him a letter and says, "Dear Ben: I tender my resignation, and, in effect, he said that the contracting business is picking up." Does that indicate that a man has been accused of wrong-doing and resented it? This is not fair comment on the evidence, it is an argument in answer to defense counsel's argument. Then the Court continued to say that they were amateurs. That is another defense for them, they are amateurs. There is always an amateur in a crime. There is always a first offense, but that is no excuse. That may be a pleading for leniency and also for your sympathy. The question is, did they have a right to accept a bribe because it required work? Would I be justified because I don't think I am getting paid enough to accept money from litigants and then say it was simply for my services?"

We respectfully submit this as an unfair comment of prosecution's argument.

The comments on the evidence were one-sided and suggested the defendants as having possibly committed

another crime, was argumentative in favor of the prosecution, and the judge told them that defendant's argument was no defense. The judge further told them that if the jury didn't think that the defendant was guilty on Count Five, then they should acquit the defendant of all the other counts. Put it in reverse of this, if they thought the defendant was guilty of Count Five, they should find him guilty of the other counts.

The Court said if there is any count in the indictment the defendant is guilty of, it is certainly Count Five, providing, of course, there was found there an attempt to accept money to influence his conduct as a member of that Board. Strictly speaking, he was not charged with intent to accept money to influence his conduct *as a member of the Board* in advising the Housing Expediter. That part of the instructions virtually told the jury to find the defendant guilty.

There was no analysis of the evidence in favor of the defendant, as is required by the decisions on comments, Judge to the jury.

These "comments" virtually deprived the defendant of trial by jury and took from him the privilege of testifying before a jury and having the jury pass upon his innocence or guilt.

For which errors we pray for reversal.

Respectfully submitted,

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